INDEX

Subject Index.

REPLY TO RESPONDENT'S FIRST POINT.....4-6
REPLY TO RESPONDENT'S SECOND POINT.....7-9
REPLY TO RESPONDENT'S THIRD POINT.....9-10
REPLY TO RESPONDENT'S FOURTH POINT.....10
CONCLUSION 10

Table of Cases Cited.

Allen v. City of Austin, 116 S. W. (2) 468 8
Boise City Irrig. Co. v. Clark, 131 F. 415.....6
City of Fort Worth v. Ridglia Village, 186 S. W. (2) 323.....8
City of Houston v. City of Magnolia Park, 276 S. W. 685 8
City of Oak Cliff, v. State, 77 S. W. 24.....8
City of Pelly v. Harris County Water Control & Imp. Dist., Supreme Ct.....7, 8
City of Wichita Falls v. Bowen, 182 S. W. (2) 695.....8
Coe v. Armour Fertilizer Works, 237 U. S. 413.....8
Cohen v. City of Houston, 205 S. W. 707.....8
Hunt v. Atkinson, 12 S. W. (2) 142.....8
Nexsen v. Bd. of Supr's., 128 S. E. 570.....8
Southern P. Terminal Co. v. I. C. C., 219 U. S. 498.....6
Steinhagen v. Eastham, 233 S. W. 660.....8
Town of Griffing Park v. City of Port Arthur, 36 S. W. (2) 593, 595.....8
Turner v. City of Beaumont, 197 S. W. (2) 114.....8
United States v. Trans-Missouri Freight Asso., 166 U. S. 290.....6
Washington Heights Indep. School Dist. v. City of Fort Worth, 251 S. W. 341.....8
Young v. United States, 315 U. S. 257.....5

Textbooks and Encyclopedias Cited.

132 A. L. R. 1185.....6

Supreme Court of the United States

OCTOBER TERM, 1946

No. 814

G. J. LUCCHESE, et al, Petitioners,

versus

GUS B. MAUERMANN, Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

TO THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE JUDGES THEREOF:

Petitioners again reiterate that the material and controlling facts are undisputed. In our petition for writ of certiorari and brief in support thereof, we have conscientiously endeavored to accurately and fully state the undisputed facts in the record.

On page 2 of respondent's brief, it is admitted that the number of the disfranchised class of voters contended for by petitioners was in fact 933, but it is stated there was no evidence or finding that any of said persons actually resided in the annexed areas on September 25, 1945, or were otherwise qualified to vote in the election of September 25, 1945.

Respondent ignores the finding of the Court of Civil Appeals that there were in fact **"enough qualified** voters living in these territories (Olmos Park and Terrell Hills) to have changed the result of the election" (R. 39). Since the highest majority received by any one of the bond issue propositions was 878 (R. 39), it is apparent that Petitioners established to the satisfaction of the Court of Civil Appeals that more than 878 qualified voters actually resided in the annexed areas on September 25, 1945. The detailed manner in which the extent of the class of disfranchised electors was established in the trial court does not appear in the Transcript of Record on file herein. In view of the above finding of the Court of Civil Appeals, it was not deemed necessary to include in the Record the large amount of evidence establishing these facts.

Respondent further challenges the following as untrue statements and not supported by the record:

> (1). That respondent conceded in the trial court that the annexed areas were in fact part of the City of San Antonio (Page 2, of respondent's brief).

(2). That the 933 citizens were, as a class, denied the right to vote in the election (Page 3 of respondent's brief).

With reference to No. (1), the record discloses that respondent testified as follows:

> Q. Do you know of any other action by the City of San Antonio, do you have knowledge of any other action by the City of San Antonio that the City is relying upon to accomplish annexation other than Exhibits 3 and 4?
>
> A. We are relying on the laws of the State of Texas, the statutes and the laws and ordinances in compliance with those (R. 33).
>
> Q. That is correct but the question is do you have knowledge of any specific official action taken by the City to accomplish annexation, other than these ordinances?
>
> A. Well, there is a lawsuit pending and we are defending the lawsuit, **we are asserting in this Court that they are a part of the City** (R. 34).
>
> Q. It is the position of the City of San Antonio, is it not, that the territory embraced and described in these ordinances, being Exhibits 3 and 4, **are a part of the City of San Antonio?**
>
> A. **Yes, sir.**
>
> Q. I believe the City has extended certain services to the territories described in these ordinances?
>
> A. We are offering any services we have, yes (R. 34).

And with reference to No. (2), the record discloses that respondent testified as follows:

> Q. Now, Mr. Mayor, with reference to the voters who reside in the area known as Terrell Hills and Olmos Park, **were those people permitted to vote?**
>
> A. **They were not** (R. 36).

REPLY TO RESPONDENT'S FIRST POINT.

Respondent contends that petitioners improperly referred to the judgments of the Court of Civil Appeals in Causes No. 11,619 and No. 11,620, as "agreed judgments", and that in view of the action of the City of San Antonio and respondent in said causes, "no action could be taken by the Court of Civil Appeals other than to affirm the judgment of the trial court" (Pages 3-4), and that the action of the respondent in Causes No. 11,619 and No. 11,620 should be considered in the same light as if he had failed to file a brief in the Court of Civil Appeals, or if he had filed a brief and had failed to show sound reasoning for setting the judgments of the trial court aside (Page 7).

Petitioners submit that, as shown in their main brief, page 5, the parties to Causes No. 11,619 and No. 11,620 in fact stipulated and agreed that the annexation ordinances were null and void, and that the Court of Civil Appeals should enter judgment declaring these ordinances to be void; and that the Court of Civil Appeals, after being advised that the questions involved in said causes were of public in-

terest and that persons not parties to the record were interested in, and will be affected by, the litigation, failed and refused to make a judicial determination on the question of the validity of the annexation ordinances. But, if it should be assumed that the parties did not in fact agree and stipulate that the annexation ordinances were null and void, and that respondent merely confessed error in his contentions in the trial court, such confession did not relieve the Court of Civil Appeals of its duty of judicially determining whether the annexation ordinances were void.

As stated by this Court in Young v. United States, 315 U. S. 257, 62 S. Ct. 510:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. See Pearlton v. United States, 64 App. D. C. 169, 75 F. 2d 772. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the crim-

> inal law cannot be left merely to the stipulation of parties. Cf. Rex v. Wilkes, 4 Burr, 2527, 2551, 98 Eng. Rep. 327; State v. Green, 167 Wash. 266, 9 P. 2d 62."

As shown in petitioners' main brief, the principle enunciated in Young v. United States has been followed in civil proceedings.

This point has been annotated in 132 A. L. R. 1185, 1186, and there the writer concludes from the many authorities cited:

> "The proposition that an appellate court may retain an appeal for hearing and determination if it involves questions of public interest even though it has become moot so far as the parties or the particular action are concerned or though the parties desire that it be dismissed, is supported, either directly or by implication, by the great weight of authority."

This principle has been sustained in: United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 17 S. Ct. 540; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 S. Ct. 279; Boise City Irrig. & Land Co. v. Clark, 131 F. 415 (C. C. A. 9th).

REPLY TO PETITIONER'S SECOND POINT.

Respondent now contends that the annexation ordinances were in fact void. As we have heretofore shown, no such contention was raised in this

cause in the trial court or Court of Civil Appeals. The Court of Civil Appeals refused to permit petitioners' attorneys to file an Amicus Curiae brief in Causes No. 11,619 and No. 11,620 to demonstrate to the Court that the annexation proceedings were in all things valid and in accord with the Constitution, Statutes and authoritative decisions of the State (R. 69).

Whether the annexation ordinances are valid is not an issue in this case, and the Court of Civil Appeals made no judicial determination on that question. But if it is, then petitioners had the right to have such issue tried out in the Court of Civil Appeals. Petitioners importuned the Court of Civil Appeals to judicially determine that issue, without avail (R. 63-69). Petitioners contend that on a proper trial of that issue they can demonstrate that the Constitution and Statutes of Texas confers on every Home Rule City the plenary power of the Legislature to fix its boundaries, with power to annex by ordinance any adjacent municipality of less than five thousand inhabitants. City of Pelly v. Harris County Water Control & Imp. Dist., decided by the Supreme Court of Texas on Nov. 27, 1946, and **not yet officially reported, reversing the Court of Civil Appeals** which held that a Home Rule City could not extend its boundaries to take in new territory which was already incorporated under legislative and constitutional sanctions. The Court of Civil Appeals case so reversed is re-

ported in 195 S. W. (2) 241. Washington Heights Independent School District v. City of Fort Worth, 251 S. W. 341, Tex.; Nexsen v. Board of Supr's of Elizabeth City, 128 S. E. 570; City of Houston v. City of Magnolia Park, 276 S. W. 685, Tex.; Turner v. City of Beaumont, 197 S. W. (2) 114, Tex.; City of Oak Cliff v. State, 77 S. W. 24, 26, Aff. 79 S. W. 1, 4, Tex.; Steinhagen v. Eastham, 233 S. W. 660, aff. 243 S. W. 457; Cohen v. City of Houston, 205 S. W. 707; Allen v. City of Austin, 116 S. W. (2) 468, Tex.; City of Wichita Falls v. Bowen, 182 S. W. (2) 695, 697, Tex.; Hunt v. Atkinson, 12 S .W. (2) 142, Tex.; City of Fort Worth v. State ex rel. Ridglia Village, 186 S. W. (2) 323, Tex. Petitioners did not have the opportunity to establish: that the annexed areas were completely surrounded by, and enclosed within, the corporate limits of the City of San Antonio; that said areas had no public debt, fire department, water supply department, electrical department, gas department, health, sewerage disposal or sanitation department; and that it was indispensable for the discharge of the obligations and purposes of the corporate existence of the City of San Antonio, and for the protection of the public health, safety and general welfare of the citizens of San Antonio that the adjacent towns of Terrell Hills and Olmos Park be annexed to the City of San Antonio. City of Pelly v. Harris County Water Control and Imp. Dist., Supreme Court, unreported, supra; Town of Griffing Park v. City of Port Arthur, 36 S. W. (2) 593, 595, Par. 5.

Respondent **assumes** that petitioners had no defense against the judgments rendered in Causes No. 11,619 and No. 11,620. As stated in Coe v. Armour Fertilizer Works, 35 S. Ct. 625, 629, 237 U. S. 413:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77."

REPLY TO RESPONDENT'S THIRD POINT.

Respondent contends that he had the right and authority to confess error and abandon the appeal in Causes No. 11,619 and No. 11,620. This point has been fully answered in the petition for writ of certiorari and brief in support thereof, Pages 20-26. Even though respondent was of the opinion that the trial court had reached the correct result in those cases, such confession did not relieve the Court of Civil Appeals of the performance of the judicial function, and the Court should have determined the questions independently of the confessions.

On Page 11, respondent states that the judgments in Causes No. 11,619 and No. 11,620 imposed no burden on petitioners. In their attempt to file an Amicus Curiae reply in said causes, petitioners showed to the Court of Civil Appeals that if the annexation ordinances are valid, then all of the tax paying citizens of the City of San Antonio have the right to have all of the tax paying citizens of Olmos Park and Terrell Hills assume and bear their part of the cost of government of the City of San Antonio, and that respondent should not be permitted to

abandon or confess away such right without a judicial determination of the question of the vilidity of the annexation ordinances (R. 66). Further, the record discloses that petitioners' property will be burdened with taxes to pay the principal and interest of bonds issued pursuant to a void election (R. 19, 28).

REPLY TO RESPONDENT'S FOURTH POINT.

We have heretofore shown that the Court of Civil Appeals found that there were enough qualified voters residing in the annexed areas on September 25, 1945, to have changed the result of the election. And it is undisputed that all of these qualified voters were, as a class, denied the right to vote in the election of September 25, 1945.

CONCLUSION.

WHEREFORE, petitioners pray as in their petion for writ of certiorari, and brief in support thereof.

Respectfully Submitted,

By.....

ELMER WARE STAHL,
San Antonio 5, Texas,
Counsel for Petitioners.

A. R. SOHN,
San Antonio 5, Texas,
Of Counsel.